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Blog > Steuerberatung > Transfer Pricing Filing Obligations: Overview of transfer pricing regulations in Switzerland

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Introduction and brief overview of transfer pricing regulations in Switzerland

Switzerland has not issued any specific transfer pricing regulations. According to Swiss law, supply relationships between related parties must be determined according to the third party prices respectively – the arm's length transfer prices.



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According to the jurisprudence of the Swiss Federal Supreme Court, an entity is considered related, if, primarily a commercial or secondarily a personal, close relationship exists between the two entities. Therefore, direct or indirect participation in the management, control, or capital is not required. The crucial question is whether the tested transaction was conducted only as a consequence of the associated relationship or not.

Transfer price adjustment in Switzerland is based on the principle of the prohibition of harmful profit shifting between related parties. According to settled case law of the Swiss Federal Supreme Court, harmful profit shifting occurs when:

- A company provides consideration without corresponding counter payment;
- The consideration was provided to a shareholder or related party;
- The consideration would not have been granted to a third party; and
- The disproportion between the consideration and the counter payment would have been clearly evident to the company.

Although the Swiss legislature has refrained from including specific transfer pricing provisions in the tax law, there are a number of administrative instructions that, implicitly or explicitly, refer to the determination of consistent transfer prices, and, in particular, instruct the cantonal tax authorities to follow OECD transfer pricing guidelines when assessing transfer prices.

I. Transfer pricing documentation in Switzerland

As an OECD member state, Switzerland has undertaken to implement the OECD BEPS minimum standards (including BEPS Action Item 13: Country-by-Country Reporting). Country-by-Country reporting (CbCR) is mandatory for multinational enterprises with total consolidated group revenue of CHF 900 million or more.

The CbCR law contains notification mechanisms that apply to ultimate parent entities and surrogate parent entities in Switzerland. Furthermore, there are also non-compliance penalties related to CbCR – penalties for non-filing or late filing, penalties for incorrect or inaccurate filing, and general penalties for non-compliance with the Swiss Federal Tax Administration's orders. Switzerland also conducts inspections to verify that the constituent entities have met their obligations.

Beyond the mandatory CbCR, there are no additional specific requirements concerning transfer pricing documentation. However, based on Art. 126 of the Federal Tax Act, taxpayers must do everything possible to enable a complete and correct assessment, and, at the request of the assessment authorities, provide information orally or in writing, and submit business books and other documents on business transactions.

Companies are therefore obliged to provide the tax authorities, upon request, with all information, including records of intragroup transactions, needed for a complete and correct assessment. In practice, the local file and master file documentation approach laid down in the OECD Transfer Pricing Guidelines is used to structure the documentation. Sanctions may apply if the taxpayer does not collaborate with the tax authorities.

Under the ordinary tax procedure and provided a non-arm's-length transaction is considered by the tax authorities, penalties do not generally apply in practice and late interest fees are privileged. However, penalties may occur, particularly where tax fraud is considered. Penalties are generally assessed in view of the taxpayer's fault. They can be challenged during administrative or criminal proceedings by providing relevant evidence or facts, or during later legal proceedings in front of the Swiss courts up to the Swiss Federal Supreme Court.

II. Economic analysis and how to demonstrate an arm's length result

Switzerland relies on the methods suggested in the OECD Transfer Pricing Guidelines (TPG), without having any direct reference to any method in its domestic legislation. In order to select the appropriate method, Switzerland will typically look at the nature of the taxpayer's controlled transactions through a functions, assets, and risks (FAR) analysis.

The availability of reliable information and uncontrolled comparables will then be assessed and compared to the controlled transactions. Finally, Switzerland will evaluate the need for comparability adjustments. In practice, statistical tools that take into account central tendencies like the interquartile range or other percentiles are usually used to narrow the range.

Besides the OECD TPG, the Federal Tax Administration (FTA) has issued circulars containing safe harbours rules concerning thin capitalisation and intragroup interest rates.

III. Advanced pricing agreements (APAs), dispute avoidance and resolution

Advance tax rulings are common. Taxpayers may request advance rulings from the Swiss tax authorities to learn how they will be subject to Swiss tax law and how much they will owe in Swiss taxes. The system of advance rulings reduces the number of tax-related disputes litigated before the courts.

Switzerland does not have a formal Advances Pricing Agreement (APA) programme in place, but it is authorised to enter into unilateral, bilateral, or multilateral APAs on the basis of the Mutual Agreement Procedure (MAP) provision in the applicable tax treaty. This allows for rollbacks of APAs, if they are within Switzerland's domestic time limit of 10 years. Usually, Switzerland seeks to settle on a 5-year agreement, but this can vary in practice. Moreover, Switzerland has extensive experience in the resolution of MAPs.

In the case of a MAP, APAs, the master file and local file, and all other relevant information for the resolution of the case are usually required.

The cantonal tax authorities are responsible for assessing direct federal and cantonal taxes and the FTA plays a supervisory role. The Swiss tax authorities do not usually perform transfer pricing investigations. However, based on ordinary taxation procedure, assessment authorities will review taxpayer declarations and carry out necessary investigations.

Furthermore, tax authorities may audit taxpayers. Accordingly, taxpayers should retain all documents necessary to prove that the transfer prices were made in accordance with the arm's length principle. The burden of proof rests on the taxpayer to prove that expenses were justified, and the tax authorities must offer proof for adjustments that increase the taxpayer's taxable income. In recent years, there has been an increase in the number of audits performed by Swiss tax authorities.

Decisions made by cantonal authorities may be challenged before the cantonal courts, and decisions made by federal tax authorities may be challenged before the Swiss Federal Administrative Court. All decisions may be appealed to the Swiss Federal Supreme Court.

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